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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-452

Supreme Court, U.S.
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CATHERINE J. HEALY, *et al.*,

Petitioners,

—v.—

F. DON JAMES, *et al.*,

Respondents.

BRIEF FOR PETITIONERS

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Respondents.

BRIEF FOR PETITIONERS

Opinions Below

The two District Court opinions in this case, one requiring a hearing, the other reviewing it, appear respectively at 311 F. Supp. 1275 and 319 F. Supp. 113. They are set out in the Petition for Certiorari, pp. 40a and 50a. The opinion of the Court of Appeals is reported at 445 F.2d 1122. It is set out in the Petition for Certiorari, p. 1a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 15, 1971. Certiorari was granted on December 7, 1971. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Whether the First Amendment forbids the president of a state college from refusing official recognition to a student political organization, when the decision is based only upon undifferentiated fear or apprehension of disturbance.

Statute and Constitutional Provisions Involved

The statute involved is section one of the Civil Rights Act of 1871, 42 U.S.C. §1983. The constitutional provisions are the First and Fourteenth Amendments.

Statement of the Case

Petitioners, students at Central Connecticut State College (CCSC), met together in September of 1969 and decided to request the college administration to grant official recognition to what they styled "a local chapter of Students for a Democratic Society" that they wished to form (A. 20). Official recognition, had it been granted, is a prerequisite to meeting anywhere on campus (A. 16-17),[1] and would have allowed petitioners to use the college's bulletin boards and newspaper for SDS notices, to use campus buildings for meetings (H. pp. 17-18; 46; 47),[2] and to seek funds from student government (A. 95).

Petitioners' application came before the Student Affairs Committee, a student-faculty body, on October 2, 1969. The application in full read as follows (A. 13):

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[1] The symbol "A" refers to the printed separate Appendix.

[2] The symbol "H" refers to the transcript of the first hearing before Judge Clarie which is part of the Record filed with the Clerk of the Court.

What follows is a brief statement of purpose of the group of students at CCSC who would like to form a local chapter of Students for a Democratic Society (S.D.S.).

1. Because the university is intended to be the arena of education, where there is an unfettered exchange of ideas, S.D.S. would provide a *forum* of discussion and self-education for students developing an analysis of American society and institutions, including higher education, and the world situation in general.

2. Because it is felt that ideas without parallel in deeds are empty and ephemeral, and that no area of life exists in a vacuum and unrelated to all other areas of life, S.D.S. would provide *an agency* for integrating thought with action so as to bring about constructive changes in the university, in American life, and the world.

3. Because of the responsibility of all peoples for the welfare of others, S.D.S. would provide a *coordinating body* for relating the problems of leftist students and other groups, such as the student body as a whole, the working class, the black populace or whatever other individuals or groups in fact or potentially in accord with the purposes of the CCSC chapter of S.D.S.

The Committee, concerned with the violent reputation of SDS' national organization, asked what the ties of the local chapter to the national would be. Petitioners replied that the local chapter would be "completely independent" and that the name was being used only because it "brings to mind the type of organization [they] wish to bring across, that is a left-wing organization which will allow students interested in such to express themselves." The committee also asked petitioners whether

they could envision SDS interrupting a class. They replied that it was impossible to say (A. 95). When asked if they would "respond to issues of violence as other SDS chapters have," they replied that "our action would have to be dependent upon each issue" (A. 95).

On October 13, 1969, after having received a formal statement from petitioners that CCSC-SDS would not be "under the dictates of any National organization" (A. 92), the committee approved the application by a vote of 6 to 2, with the explicit condition "that the Committee would consider the immediate suspension of the local chapter if its activities, programs, and functions were incompatible with those of the College" (A. 99-100).

Respondent James, the President of the University, declined to accept the advice of the committee and, on October 30, 1969, denied recognition to the chapter. He felt that "the statement of purpose to form a local chapter of Students for a Democratic Society carries full and unmistakable adherence to at least some of the major tenets of the national organization, loose and divided though that organization may be" (A. 15). When petitioners and others met a week later in a coffee shop at the Student Center on campus to discuss the respondent James' decision, he interpreted this as a meeting of CCSC-SDS and ordered the meeting to disband (A. 16-17). Petitioners complied without protest.

On February 24, 1970, petitioners began this lawsuit to seek official campus recognition of CCSC-SDS. After a hearing on a motion for preliminary injunction, Judge Clarie ordered the college to hold a hearing to resolve ambiguities about the relationship between CCSC-SDS and

the national organization. He felt that "[t]he term itself 'local chapter,' strongly infers some sort of affiliation with a more extensive parent organization. . . ." Pet. for Cert., p. 62a. The hearing was held May 19th and 25th, 1970. For their part, petitioners submitted a statement signed by five of their number that CCSC-SDS "shall have no connection whatsoever to the structure of an existing national organization, or organizations, bearing the name Students for a Democratic Society" (A. 101-102),[3] and their faculty advisor testified that SDS on a campus where he has been a student, two or three years previously, had "no connection whatsoever" with any outside group (A. 68-69). Over petitioners' counsel's objection, the hearing officer introduced into evidence Hearings held by the House of Representatives' Committee on Internal Security concerning Students for a Democratic Society to show provisions in the SDS national constitution requiring adherence to national policies by local affiliates.[4]

On July 10, 1970, Respondent James again denied petitioners' application (A. 103-105). He stated that the hearing had failed to resolve the ambiguity concerning the connection between CCSC-SDS and the national SDS organization. He failed to understand, he said, how the group could be totally free of any influence from an organization whose name it used. This, he apparently felt, justified imputing to the local the motives of the national. He concluded that recognition "would be contrary to the orderly process of change and would be contrary to the philosophy and lawful mission of this College" (A. 105).

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[3] The hearing officer volunteered that he did not question the credibility of these petitioners (A. 76). But see note 10, *infra*.

[4] See note 11, *infra*.

Petitioners returned to Judge Clarie, who had retained jurisdiction in the suit, and moved to reject James' findings. Judge Clarie denied their motion and, on the ground that petitioners had "not sustained their burden of demonstrating that their identifying with the national corporate name of the SDS permits them to function with absolute freedom from the dictates, influence and image of the national organization, notwithstanding their verbal protests to the contrary," Pet. for Cert., p. 48a, granted summary judgment to respondents. The United States Court of Appeals for the Second Circuit affirmed.[5]

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[5] The Circuit also reasoned that the failure "to submit a copy of their charter or by-laws" (Pet. for Cert., p. 20a) supported respondent James' denial of the application. Since James did not rely on this as a reason for denying the petition—nor did the district court—it is improper for a reviewing court to adduce it as a reason to justify James' decision. *Trister* v. *University of Mississippi*, 420 F.2d 499, 503 (5th Cir. 1969); *Johnson* v. *Branch*, 364 F.2d 177, 181 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

The majority's reference to "disruptive tactics" by petitioners' counsel seems to underlie its cryptic conclusion that petitioners "failed to avail themselves of the procedural due process accorded to them." Pet. for Cert., p. 20a. The characterization of counsel's behavior is unfair, particularly since the hearing officer congratulated everyone, including counsel, for their civility (A. 50-51), and it is necessary to pursue the point at some length so that this Court is not misled about the heart of the controversy in this case.

The Court of Appeals labelled four incidents "disruptive tactics": (1) an objection to tape-recording of the hearing, rather than a stenographic transcript; (2) an objection to respondent James's absence; (3) two exclamations of exasperation: that "[t]his [hearing] is really terrific" and that he, counsel, was "outraged;" and (4) calling of respondent James as a witness and asking him whether he had made any prejudgment of the case and whether he would be influenced by petitioners' statement that they would have no connection with the SDS national office. *Id.* at pp. 10a-13a.

(1) The objection to tape recording was made on the ground that it would be impossible to tell until after the hearing whether any portions of the testimony had been missed (A. 33). There is no indication in the record that counsel's action was in bad faith, and, in fact, one portion of the typed transcript of the tape indicates

Summary of Argument

I.

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), held that "First Amendment rights . . . are available . . . to students." *Tinker*, which involved junior high school and high school students, should

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that a question from the hearing officer was too unclear to be transcribed (A. 73).

(2) Although the district court opinion stated that a hearing officer could hold the hearing in place of respondent James (*id.* at p. 61a), petitioners could legitimately desire respondent James, who would make the final decision, to hear their argument personally.

(3) From the cold record, one could reasonably conclude that the hearing officer himself precipitated counsel's exasperation. The hearing officer refused to allow respondent James to answer any of counsel's questions. He admitted, for example, that James was counsel's witness but ruled that his was "an improper line of questioning for a client's witness" (A. 61). While he claimed that the hearing was "not a legal proceeding" (A. 33), he continually made final evidentiary decisions that juggled the rules so that only that evidence favorable to James's eventual decision was received. The record is rife with examples of unprincipled decisions fleshed out with ill-used legal terminology. The hearing officer ruled questions about respondent James's prejudgment "irrelevant and immaterial" (A. 58); he ruled that evidence before a Congressional Committee could not be objected to as hearsay (A. 71); citing the advice of "our counsel," he ruled that petitioners' written statement that they had no tie to the SDS national and changing the name of the proposed organization to eliminate the objectionably ambiguous term "local chapter" was an "amended application" that was "not germane" because "not introduced in the federal record" (A. 60)—apparently reasoning that the ambiguities that the federal judge found in the record could only be resolved by the evidence then before the federal judge. In face of these bizarre rulings, one could hardly say that the lawyer was being intemperate, much less disruptive, for saying "this is really terrific" or that he was "outraged."

(4) While the procedure of calling respondent James personally to the stand as a witness was perhaps unorthodox, it appeared to

be applied more broadly to the case at bar which involves university students. Petitioners' First Amendment rights must be measured by the same standards that are applied to adults at large. *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Eisner* v. *Stamford Board of Education*, 440 F.2d 803, 808 n. 5 (2nd Cir. 1971). Correlatively, when a university is acting as a municipality, it should be required to conform to the same constitutional norms as its governmental counterparts.

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be necessary in this case. In the first place, counsel wanted the record to reflect that respondent James had made public statements in a speech to the Lions Club which indicated that he had already decided the case, without having held the hearing on which he was to base his decision. Confronting an administrative officer with his own damning statements is certainly not graceful—it is bound to produce a hostile witness—but neither is prejudgment graceful. James appeared voluntarily at the hearing; given this opportunity, counsel proceeded to examine him with the directness that any competent trial lawyer would have practiced in the same situation. Faced with a difficult tactical problem—how to get evidence of prejudice into the record—he used an unusual technique, and his aim seems to have been to reach the truth, not to disrupt the hearing. But counsel had another, more basic reason for wanting to deal directly with respondent James. The hearing officer had effectively stifled petitioners—especially by ruling that their statement disavowing ties to the SDS was not germane. Counsel wanted to cut through the hearing officer's grudging procedure and find out what James thought of the statement, whether he would consider it, and whether he would make any judgments about petitioners' credibility.

Perhaps most important of all, at no time during the hearing, as spirited as the interchanges between counsel and hearing officer seem to have been, did the hearing officer object to counsel's conduct or indicate that he thought counsel's tactics disruptive. The record ought not be distorted now to make it appear that counsel wilfully disrupted the hearing. The line between argument and disruption is sometimes a fine one—compare *In re McConnell*, 370 U.S. 230, 235-36 (1962) with *Parmelee Transportation Co.* v. *Keeshin*, 294 F.2d 310, 314 (7th Cir. 1961) *rev'd*, 370 U.S. 230 (1962)—and an appellate court should be loath to condemn on the basis of a cold, written record.

The First Amendment has been applied on both secondary school and university campuses in a wide variety of cases by other courts, both before and after *Tinker*. Such cases have included prohibitions against disciplining students for distributing unofficial newspapers on school grounds or from wearing arm bands, like the Tinkers, in school for the purpose of political protest. Regulations prohibiting distribution of anti-war leaflets have been struck down as overbroad and the offense of "misconduct", contained in a university regulation, has been held unconstitutionally vague. University administrators' efforts to interfere with the appearance of controversial guest speakers on campus have been uniformly declared unconstitutional. Two cases have affirmatively applied the First Amendment to set aside refusals, such as in this case, to recognize student organizations.

II.

Though the basis for the respondents' decision to deny petitioners' recognition as a local chapter of SDS does not emerge with clarity, either from the administrative record or from the opinions below, it seems that the college president anticipated disruption should SDS come to his campus, and was not satisfied with petitioners' assertions that they would not be affiliated with national SDS. The Second Circuit affirmed, ostensibly on the ground that the "plaintiffs failed to avail themselves of the procedural due process accorded to them . . . ." Upon analysis, the decision actually is based upon agreement with the substance of the findings by the president of the college. The Court of Appeals decision can also be read as putting on petitioners the burden of proving that they would not engage in vio-

lence or disruption. Such a holding is contrary to the decisions in *Speiser* v. *Randall*, 375 U.S. 513 (1958) and *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

The evidence was insufficient to show that petitioners would engage in violence or disruption. The only evidence introduced on behalf of the college was a few arbitrary selections from hearings held by the House Internal Security Committee on the Students for a Democratic Society. Petitioners, for their part, asserted time and again that their local group would be entirely independent of the national SDS.

Assuming for argument's sake that the record adequately establishes that some SDS groups have employed violence, *Scales* v. *United States*, 367 U.S. 203 (1961) and *Noto* v. *United States*, 367 U.S. 290 (1961), make it clear that "guilt" cannot be imputed to petitioners.

III.

The denial of recognition to petitioners' local SDS group was a forbidden prior restraint. *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963); *Carroll* v. *President and Commissioners*, 393 U.S. 175 (1968); *New York Times* v. *United States*, 403 U.S. 713 (1971).

IV.

On this record the First Amendment requires that petitioners' local SDS group be granted official recognition because respondents' denial of such recognition was based upon nothing more than an "undifferentiated fear or apprehension of disturbance" *Tinker* v. *Des Moines Independent School Board, supra.*

Shelton v. *Tucker*, 364 U.S. 479 (1960), *United States* v. *Robel*, 389 U.S. 258 (1967) and *Aptheker* v. *United States*, 378 U.S. 500 (1964), stand for the proposition that respondents must use less drastic means to secure a valid interest in being free of illegal disorders. One constitutional alternative available to the college administrators is punishment of individual students, pursuant to valid college rules, for their part in any illegal activity which might occur. Withdrawal of recognition and injunctions against illegal conduct are two additional alternatives for dealing with illegality, should it occur.

ARGUMENT

I.

The First Amendment, as applied by this Court and lower federal courts in other campus cases, requires that petitioners' SDS group be granted official recognition.

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), the touchstone for this case, held explicitly that the First Amendment applied to the campus. "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to . . . students."

On the facts of this case, which involves university students, *Tinker* states only the bare minimum of First Amendment rights available to petitioners. We believe that petitioners' speech, assembly and associational rights should be held to exceed those extended to the junior high school and high school students who were the parties in *Tinker* for

there is no reason either in logic or experience to measure petitioners' First Amendment rights by any different standard than is applied to adults at large.

Mr. Chief Justice Burger, writing for the plurality in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), found a constitutionally significant distinction between elementary and secondary school students on the one hand, and university students on the other. In that case, the statute which authorized federal funds to finance the building of academic facilities on the campuses of church-related colleges was challenged as an unconstitutional establishment of religion. One of the reasons relied upon by the Chief Justice to support the constitutionality of the statute, as distinguished from impermissible enactments designed to finance elementary and secondary parochial schools, see *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), was that "college students are less impressionable and less susceptible to religious indoctrination." 91 S. Ct. at 2099. Judge Kaufman, in *Eisner* v. *Stamford Board of Education,* 440 F.2d 803, 808 n. 5 (2nd Cir. 1971), drew the same distinction. In addition, he thought that regulations affecting speech must meet a higher First Amendment burden in the university, not only because of "the greater maturity of the students there," but also because of "the larger size of university campuses, and the tendency of students to spend a greater portion of their time there . . . " In effect, Judge Kaufman recognized that a university campus is a community of adults in every sense of the word and therefore entitled to a full portion of constitutional rights. Correlatively, when a university is acting as a municipality—as legislature, police force, prosecutor, judge and jury—it should be required to conform to the same constitutional norms as its other governmental

counterparts. See *Niemotko* v. *Maryland,* 340 U.S. 268 (1951) (a park); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963) (state capitol grounds); *Wolin* v. *Port of New York Authority,* 392 F.2d 83 (2nd Cir. 1968) (municipal bus station); *Marsh* v. *Alabama,* 326 U.S. 501 (1946) (a company town); *Amalgamated Food Employees* v. *Logan Valley Plaza Inc.,* 391 U.S. 308 (1968) (a shopping center); and *Brown* v. *Louisiana,* 383 U.S. 131 (1966) (a library).

The Twenty Sixth Amendment, which enfranchised virtually every university student, further supports the claim that the maturity of college-age students has constitutional significance. The Amendment increases the burden on college administrators to comply with the First Amendment, lest they interfere with the free exchange of political ideas and, consequently, with the process by which the decision is made about how members of the electorate will cast their ballots.

The First Amendment has been applied on both secondary school and university campuses in a wide variety of cases by other courts, both before and after *Tinker.*

High school students have been protected by the courts when they were disciplined for distributing unofficial newspapers on school grounds. *Eisner* v. *Stamford Board of Education, supra; Scoville* v. *Board of Education of Joliet Township,* 425 F.2d 10 (7th Cir. 1970); *Sullivan* v. *Houston Independent School District,* 307 F. Supp. 1328 (S.D. Tex. 1969).

Students other than the Tinkers have been protected by the courts when they too wore armbands in school in order silently to protest the war, *Butts* v. *Dallas Independent*

School District, 436 F.2d 728 (5th Cir. 1971), or to protest education policies, *Aguirre* v. *Tahoka Independent School District,* 311 F. Supp. 664 (N.D. Tex. 1970).

Overbroad regulations prohibiting distribution of anti-war leaflets have been struck down on behalf of both a junior high school student, *Riseman* v. *School Committee of the City of Quincy,* 439 F.2d 148 (1st Cir. 1971), and a non-student on a university campus, *Jones* v. *Board of Regents,* 436 F.2d 618 (5th Cir. 1970).

The offense of "misconduct," as contained in university regulations has been held unconstitutionally vague. *Soglin* v. *Kaufman,* 418 F.2d 163 (7th Cir. 1969).

University administrators' efforts to interfere with the appearance of controversial guest speakers on campus have been uniformly declared unconstitutional. E.g., *Pickings* v. *Bruce,* 430 F.2d 595 (8th Cir. 1970) ("militant" views on race relations); *Brooks* v. *Auburn University,* 296 F. Supp. 188 (M.D. Ala. 1969) (Rev. William Sloan Coffin); *Molpus* v. *Fortune,* 311 F. Supp. 240 (N.D. Miss. 1970), affirmed 432 F.2d 916 (5th Cir. 1970) (student revolt leader); *Smith* v. *University of Tennessee,* 300 F. Supp. 777 (E.D. Tenn. 1969) (Dick Gregory and Dr. Timothy Leary); *Snyder* v. *Board of Trustees,* 286 F. Supp. 927 (N.D. Ill. 1968) (Communist Party member); *Dickson* v. *Sitterson,* 280 F. Supp. 486 (M.D. N.C. 1968) (Executive Director of National Committee to Abolish the House Un-American Activities Committee and Director of the American Institute of Marxist Studies).

Two cases have affirmatively applied the First Amendment to set aside refusals, such as in this case, to recognize student organizations. *ACLU of Virginia* v. *Radford*

College, 315 F. Supp. 893 (W.D. Va. 1970); and *University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union* v. *University of Southern Mississippi,* —— F.2d —— (5th Cir. 1971).

To be sure, not every court has vindicated the asserted constitutional rights of students, see e.g., *Estaban* v. *Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969); and *Guzik* v. *Drebus,* 431 F.2d 594 (6th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); but since *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961), ". . . for good or for ill, the Constitution has come to the campus." Wright, *The Constitution on the Campus,* 22 Vand. L. Rev. 1027, 1033 (1969).[6]

This case gives the Court the opportunity to implant the First Amendment firmly on the college campus. The fact that it arises at a time when the memory of turmoil on campus is still fresh in mind, and that it involves SDS, which is equally fresh in mind, cannot deter the Court from recognizing the essentiality of the constitutional principles put forward on petitioners' behalf. The right of these petitioners to secure recognition for their SDS group is a central portion of the freedom to which Mr. Justice Frankfurter referred when he noted that a free society depends upon free universities. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 262 (1957). If President James' arbitrary decision to ban SDS from his campus is permitted to stand,

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[6] Professor Wright clearly believes it is "for good":

> It is my judgment, on balance, that the application of constitutional principles to universities has its costs, but these are tolerable costs if they are viewed without exaggeration. The costs are considerably outweighed by the benefits. 22 Vand. L. Rev. at 1086.

our universities will be less free. But, again, as Mr. Justice Frankfurter noted:

> A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—"to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of immutable doctrine is repugnant to the spirit of a university. *Sweezy* v. *New Hampshire, supra* at 262-263.

II.

Denial of petitioners' application for official recognition of Students for a Democratic Society was based upon both insubstantial evidence and constitutionally impermissible inferences.

A. *Reasons for Refusing Recognition.*

The President of Central Connecticut State College—both before and after hearing—has persistently refused official recognition of the local chapter of SDS proposed by petitioners.

After petitioners' application was approved by a 6-2 vote of the Student Affairs Committee in October, 1969 (A. 100), President James denied recognition on the grounds that (A. 15-16):

> (1) ". . . a local chapter of Students for a Democratic Society carries full and unmistakable adherence to at least some of the major tenets of the national organization, loose and divided though that organization may be."
>
> (2) "The published aims and philosophy of the Students for a Democratic Society, which include disrup-

> tion and violence, are contrary to the approved policy (by faculty, students, and administration) of Central Connecticut State College."
>
> (3) Petitioners' statement that " 'CCSC Students for a Democratic Society are not under the dictates of any National organization' in no way clarifies why if a group intends to follow the established policy of the college, they wish to become a local chapter of an organization which openly repudiates such a policy."

Shortly afterwards, in December, President James reported his denial of recognition to SDS in the college's alumni publication (A. 23-24).

> I cannot sanction an organization that openly advocates the destruction of the very ideals and freedoms upon which the academic life is founded. In denying the SDS official recognition, I have emphasized that the philosophies, actions and violence of that organization are counter to the official policy of the College.

After the hearing which was ordered by the district court, President James gave the following reasons for finally denying recognition:

> (1) Failure to clarify petitioners' "affiliation and/or association with the national organization of Students for a Democratic Society (a/k/a SDS) and/or any of its splinter groups" (A. 103).
>
> (2) ". . . various activities of local SDS Chapters, Regional Headquarters of the SDS, the National offices, and others associated with the organization . . . would be a disruptive influence at CCSC" (A. 104).
>
> (3) ". . . intransigence of counsel . . . " (A. 105).[7]

[7] See note 5, *infra*.

One cannot say from all of these explanations, what the precise reason was for President James' decision to deny recognition. He

The district court concluded, without reference to any specific facts of record, that "The evidence clearly and unequivocally discloses that the philosophy and purpose of the national organization advocate the violent overthrow of existing government institutions, through the medium of disruptive anarchistic force" (Pet. for Cert. 48a-49a), and that "the applicants have not sustained their burden" of disassociating themselves "from the dictates, influence and image of the national organization" (*id.* at 48a).

The Court of Appeals disposed of petitioners' claims by holding that "plaintiffs failed to avail themselves of the procedural due process accorded to them and thus prevented the President of the College and the administration from applying that policy to plaintiffs' application so as to implement that undoubted authority of the college officials to control student conduct, consistent with fundamental constitutional safeguards" (*id.* at 20a).

Although the Court of Appeals opinion thus rests on what seems at first blush to be a procedural ground, logic requires the conclusion that it actually rests on substantive grounds (notwithstanding the court's statement that it is ". . . neither necessary nor appropriate, upon this record, to reach the substantive constitutional questions, . . ." *Id.* at 22a). It does so because petitioners' alleged failure to "avail themselves" of procedural due process consisted,

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speaks of "disruption and violence" in his initial decision, of advocacy in his report to the alumni, and of "disruptive influence" in his final decision. If mere advocacy was the actual basis for decision, this case would clearly be controlled by *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), which would compel reversal. But this brief proceeds on the assumption that it was something more than anticipation of advocacy which impelled James' decision—that it was "disruption and violence" which he anticipated.

according to the court's opinion, in failing to clarify their relationship with national SDS and in failing to say whether they would resort to violence or disruption (*Id.* at 20a-21a). But these alleged failings in fact implicate the very constitutional issues which the court said it did not have to reach, namely, "the questions whether the national SDS organization was prone to violence and, if so, whether denial of recognition to plaintiffs' local organization—identified by name with the national—violated plaintiffs' constitutional right of assembly . . ." (Pet. for Cert., p. 22a, n. 39).[8]

The Court of Appeals decision can also be read as putting on petitioners the burden of proving that they would not engage in violence or disruption and that they would have no connection with national SDS. (The district court so held. Pet. for cert. 47a.) But such a holding would clearly be inconsistent with this Court's decisions concern-

[8] To affirm James' denial of recognition by charging petitioners with the failure to be cooperative at the hearing, is the equivalent of granting the school a default judgment. But since even a default judgment must ultimately rest on the assertion of adequate facts to support a cause of action, the Court of Appeals must have been satisfied that the school had adequately proved that national SDS was prone to violence and that there would be some kind of relationship between national SDS and petitioners' local group; and the Court of Appeals must also have been satisfied that these two facts could be linked by imputation of SDS' violence to petitioners. Any other analysis would mean that a party could win a lawsuit, upon default of the other side, even without a legally cognizable claim or without the assertion of facts adequate to support a cognizable claim. But "it is a general rule that a judgment by default must be justified by the pleadings. Such a judgment may not be rendered where the pleadings of the plaintiff omit averments essential to the showing of a cause of action." Am. Jur., Judgments, §213. Consequently, the petitioners may and indeed do claim both that the evidence was insufficient to support the school's factual claims, and that the theory of imputation was constitutionally impermissible.

ing the procedures which must be employed in First Amendment case. *Speiser* v. *Randall,* 357 U.S. 513 (1958); *Freedman* v. *Maryland,* 380 U.S. 51 (1965). See also Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). In *Speiser* v. *Randall,* this Court overturned a requirement that taxpayers prove non-advocacy of violent overthrow of the government, holding that "the State [must] bear the burden of persuasion" that First Amendment activities can be inhibited. 357 U.S. at 526. And in *Freedman* v. *Maryland,* the Court held that the first procedural prerequisite of any attempt to impose a prior restraint is that "the burden of proving that the film is unprotected expression must rest on the censor." 380 U.S. at 58. As Judge Smith, dissenting below, correctly said, " . . . it appears to me to have been established beyond doubt that the burden of providing a justification for this type of prior restraint rests squarely on the shoulders of those who seek to impose it" (Pet. for Cert., p. 38a).

B. *The Evidence Was Insufficient to Show That Petitioners Would Engage in Violence or Disruption.*

Keeping in mind the high degree of proof which is demanded by the First Amendment before the state may penalize individuals by finding them guilty by association [*DeJonge* v. *Oregon,* 299 U.S. 353 (1936); *Scales* v. *United States,* 367 U.S. 203 (1961); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Baird* v. *Arizona,* 401 U.S. 1 (1971); *Re Stolar,* 401 U.S. 23 (1971], it must be concluded that the proof was insufficient to establish that petitioners' SDS group would engage in violence or disruption.

At the time of petitioners' initial application for recognition, when they appeared before the Student Personnel

Committee, they were asked about affiliation with national SDS and replied, "The chapter does not affiliate with the national organization; we will be completely independent" (A. 94). They were then asked, "Why does the local chapter care to use the national name if it will not affiliate?"; they answered, "Because the name brings to mind the type of organization we wish to bring across, that is a left-wing organization which will allow students interested in such to express themselves" (A. 94-95). At their second appearance before the Student Affairs Committee, petitioner Tester said there was "no such thing as an SDS National; that individuals in the organization wanted to keep a loose arrangement and wanted to be able to pick ideas from several of the factioned groups, he stated that the concept of SDS exists in the minds of those who run it" (A. 98).[9] In addition, petitioners' faculty advisor, Dr. Brown, testified at the hearing that, as a recent student at the University of Michigan, he knew that the SDS chapter there "had absolutely no connection whatsoever with any other outside organization" (A. 68-69). Finally, at the hearing following the district court remand, petitioners submitted a signed statement which unequivocally stated that Students for a Democratic Society of Central Connecticut State College "shall have no connection whatsoever to the structure of an existing national organization or organizations bearing the name Students for a Democratic Society. Fur-

[9] At the very time petitioners applied for recognition, SDS was in the middle of an ideological struggle among a variety of factions. One group called itself the Revolutionary Youth Movement (RYM); a split from RYM called itself RYM II. A third faction called itself the Worker-Student Alliance. Adelson, SDS (New York 1972) 225-264. RYM soon came to call itself The Weathermen and "gave up trying to call itself SDS at all." *Id.* at 245. It is not entirely clear who SDS was in the Fall of 1969, nor is it any clearer now. *Ibid.*

thermore, the organization shall be unaffiliated with any other organization" (A. 102).[10]

In the face of this evidence, the college introduced four exhibits consisting of hearings before the House Internal Security Committee entitled "Investigations of Students for a Democratic Society," Parts 1A, 1B, 3A, and 6B.[11]

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[10] The Hearing Officer, Dean Judd, took the position for some inexplicable reason that this statement was inadmissible. He said, "I see fit not to acknowledge it as a matter for discussion in this case since the only basis upon which the College can conduct the hearing is on what Judge Clarie ordered . . ." (A. 45). Petitioners' attorney tried futilely to explain that, since the subject matter of petitioners' signed statement involved one of the precise questions which Judge Clarie asked to have clarified, he ought to entertain it (A. 36-42; 45-47).

[11] Curiously enough, these exhibits were introduced by the Hearing Officer to make the college's case, such as it was. Surely, to play the dual role of prosecutor and hearing officer offends due process. *In Re Murchison*, 349 U.S. 133 (1955); *In Re Oliver*, 333 U.S. 257 (1948); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Petitioners do not press the point, however, since it was not raised below. But petitioners would suggest that the arrangement reflects a certain insensitivity to constitutional principle which might be said to characterize as well the President's final decision.

There is another curious point to be made of these exhibits. The Hearing Officer, in introducing them, made reference to them only for the purpose of trying to show some kind of formal relationship between national SDS and its chapters by reference to specific pages (A. 46-50, 70). When petitioners' attorney asked whether they were being introduced to "identif[y] the character" of SDS, the Hearing Officer replied, "I'm not here to answer your questions as a witness" (A. 68). Nonetheless, President James used those documents as the entire basis for showing that SDS had been involved in disruptions in Columbus, Ohio, and George Washington University, and that he would therefore deny petitioners' application for recognition for that reason (A. 104-105).

One can only speculate what petitioners' response might have been had they understood that these Committee hearings were being used to establish SDS' violent proclivities: possibly awe at having to take on the United States Congress; possibly they might

Contrasted to the evidence put forward by petitioners, including their stated purpose in organizing a local SDS Chapter (*supra*, p. 3) and their denial of any affiliation with national SDS, there is insufficient evidence to support the denial of recognition. As Judge Smith, dissenting below, said, "The appellees have not come forward with any evidence as to a threat of substantial disruption of the operation of the school by the appellants" (Pet. for Cert. 38a).

C. *It Is Impermissible to Infer From the Evidence in the Record That Petitioners Would Engage in Disruption and Violence.*

Assuming for argument's sake that the record adequately establishes that some SDS groups have employed violence as an instrument of their political program, or even that spokesmen for national SDS[12] advocated and practiced violence as a means of achieving their political objectives, petitioners cannot be penalized by inference from those beliefs or practices. That is the clear lesson of *Scales* v. *United States*, 367 U.S. 203, 220 (1961) and *Noto* v. *United States*, 367 U.S. 290 (1961), which require that conviction for membership in an illegal organization must rest upon an unequivocal showing of "active" membership, "knowledge of the Party's illegal advocacy, and a specific intent to bring about violent overthrow." The Court's opinion in *Scales* took special cautionary note of the dangers

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have done what they did anyhow—deny any relationship with national SDS. Our thesis, however, is that such evidence proves nothing as to these petitioners in this case.

[12] But see note 9, *supra*, which points out the several competing factions which were wrestling for control of national SDS at the time of petitioners' application for recognition.

to freedom involved in imputing guilt to an individual because of his associations (367 U.S. at 227-228):

> It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that "act" alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing.
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> * * * * *
>
> [The membership statute is constitutional when it] is found to reach only "active" members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.

Since there was no such necessary evidence which related to the particular petitioners, the inference of guilt by the college administrators was entirely baseless and violated constitutional standards. *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 9 (1971) ("mere membership in an organization can never, by itself, be sufficient ground for a state's imposition of civil disabilities"); Re Stolar, 401 U.S. 23, 28-29 (1971) ("nor may the State penalize petitioner solely because he personally . . . 'espouses illegal aims' ").

III.

The denial of recognition was a forbidden prior restraint.

No matter how one looks at this case, even from the perspective of the Second Circuit, one must conclude that petitioners' application for recognition of CCSC-SDS was denied because the administrators thought that SDS on campus meant trouble.[13] Perhaps so, but as we put forward below, the only constitutionally permissible recourse was to grant recognition and take appropriate steps when and if members of CCSC-SDS engaged in, or presented a clear and present danger of engaging in conduct which could constitutionally be forbidden under valid college rules. To nip SDS in the bud, as was done here, was to employ a forbidden prior restraint upon First Amendment rights including the right of assembly, *DeJonge* v. *Oregon, supra,* and the right of association:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958).

See also *Bates* v. *City of Little Rock,* 361 U.S. 516, 523 (1960).

As this Court said in *Bantam Books* v. *Sullivan,* 372 U.S. 58, 70 (1963), and reaffirmed only last year in *New York*

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[13] Other political organizations having been granted official recognition by the college (A. 18), the petitioners may of course litigate this discriminatory denial of their application. *Shuttlesworth* v. *Alabama,* 394 U.S. 147 (1969).

Times v. *United States,* 403 U.S. 713 (1971), "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The special vice of prior restraints is that they suppress "the precise freedom which the First Amendment sought to protect against abridgement." *Carroll* v. *President and Commissioners,* 393 U.S. 175, 181 (1968). What the prior restraint in this case meant, was that no group possessing the special political perspective of SDS would be allowed to meet on campus for any purpose, including quiet discussion of political issues, or efforts to convert others to their political beliefs through conversation and debate. In fact, an informal group of fifteen students, including some petitioners, sat together in a coffee shop on campus to discuss President James' initial denial of recognition to SDS. They were then and there ordered to disperse by two college administrators, one of whom produced a written memorandum informing the group that that very meeting, and any others on campus by SDS, were forbidden because "CCSC-SDS is not a duly recognized college organization" (A. 16-17, 23).

In short, SDS' political beliefs were totally suppressed on campus by virtue of the denial of recognition. That, we suggest, is a most successful prior restraint—and abhorrent to our notions of freedom.

The speaker-ban cases, all of which, like the case at bar, involve college administrators' fear of disorder, are compelling instances of prior restraints in similar circumstances which have been struck down without exception.

Snyder v. *Board of Trustees,* 286 F. Supp. 927 (N.D. Ill. 1968), held unconstitutional a state statute which prohib-

ited the use of any facilities of the University of Illinois to "any subversive, seditious, and un-American organization." In addition to finding the statute vague and overbroad, the court also found it to be a prior restraint.

> The Clabaugh Act stifles communication even before it has taken place. It does not regulate merely the form of the speech—the time, place and manner of speaking. It classifies and regulates speech on the basis of the content, the very ideas to be expressed. By thus acting as a prior restraint on the substance of the contemplated speech, the Clabaugh Act raises the spectre of censorship. 286 F. Supp. at 936.

In *Brooks* v. *Auburn University*, 296 F. Supp. 188 (M.D. Ala. 1969), the court issued an injunction requiring the University to allow Rev. William Sloan Coffin to speak on campus. The University prohibited his appearance on the ground that he might advocate breaking the law and because he was a convicted felon.

> The State of Alabama cannot . . . regulate the content of the ideas students may hear. To do so is illegal and thus unconstitutional censorship in its rawest form. 296 F. Supp. at 196.

In *Molpus* v. *Fortune*, 311 F. Supp. 240 (N.D. Miss. 1970), officials of the University of Mississippi banned a speaker from appearing on campus because he had been a leader in a student revolt at another school which had resulted in damage to buildings, disruption of classes, and intimidation of faculty and students. After a hearing the court concluded that the speaker's appearance would not present a "clear and present danger to the orderly operation of the University." *Id.* at 249. See also *Smith* v. *University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn.

1969); *Pickings* v. *Bruce*, 430 F.2d 595 (8th Cir. 1970); *Buckley* v. *Meng*, 34 Misc. 2d 467, 230 NYS2d 924 (Sup. Ct. 1962).

All of these cases reflect the well established First Amendment doctrine that speech, on the campus as well as off, cannot be curtailed either because the authorities dislike its content or because of their undifferentiated apprehension of disorder. The Court emphasized the especially dangerous features of prior restraints in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 180-181 (1968):

> Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abused are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.

The precise freedoms suppressed in this case include the right of petitioners and other students to meet anywhere on the campus to discuss politics from the ideational point of view represented by SDS, as well as the right to communicate their political ideas, as represented in the various doctrines advocated by SDS, to other students through the campus newspaper, on campus bulletin boards, and at public meetings. Such an effective suppression of political ideas, accomplished by the device of denying recognition to CCSC-SDS, must be struck down in this case as a gross burden on the First Amendment.

IV.

On this record, the First Amendment requires that CCSC-SDS be granted official recognition.

A. *Denial of Recognition Was Based on "Undifferentiated Fear or Apprehension of Disturbance."*

The respondents have a valid interest in the subject matter of this case. That interest is circumscribed by the metes and bounds of *Tinker*, as that opinion variously expressed it: to be free of "disruptive conduct," or "aggressive, disruptive action," or "interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be left alone," or "material and substantial interference with the requirements of appropriate discipline in the operation of the school," or "material and substantial interference with school work or discipline," or behavior which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[14] Petitioners run afoul of none of those standards. To the contrary, it is the administration of Central Connecticut State College which has breached that part of *Tinker* which explicitly prohibits invasions of First Amendment freedoms which rest upon "undifferentiated fear or apprehension of disturbance . . ." 393 U.S. at 508. There can be no doubt of that, for all the administrative proceedings revolved around the assumption that where goeth SDS, so goeth disorder. That propo-

[14] We have put forward the claim that these several formulations, articulated in a case involving high school and junior high school students, would have to be applied more narrowly in university-level cases. But we have no quarrel with those standards in this particular case because loose as they are, petitioners have offended none of them.

sition was certainly not proven, and one does not know if it could be, but the administration wasn't going to take any chances—even though it meant trampling the First Amendment underfoot. In its "undifferentiated fear or apprehension," the administration just swept aside petitioners' affirmation that their purpose was to "provide a forum of discussion and self-education for students developing an analysis of American society and institutions . . . [to] provide an agency for integrating thought with action so as to bring about constructive changes . . . [and to] provide a coordinating body for relating the problems of leftist students and other groups, such as the student body as a whole, the working class, [and] the black populace . . . " (A. 92).[15] For all we know, the special political perspective of SDS is now absent from campus. The administration may enjoy that condition, but the Court must acknowledge that it was achieved at the expense of fundamental First Amendment doctrine, for "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed

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[15] The minutes of the October 2, 1969 meeting of the Student Personnel Committee reports the following colloquy (A. 95):

> Q. How would you respond to issues of violence as other SDS chapters have? A. Our action would have to be dependent on each issue.
>
> Q. Would you use any means possible? A. No I can't say that; would not not know until we know what the issues are.

These responses are as predictably vague as the questions. By themselves they mean nothing, and were not relied upon as the basis for the James' denial of recognition. At worst, they can be read to reject outright renunciation of violence under all circumstances. But as the Court said in *Noto* v. *United States*, 367 U.S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."

to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio, supra* at 447.

Finally, *University of Southern Mississippi Chapter of the Mississippi Civil Liberties Union* v. *University of Southern Mississippi,* —— F.2d —— (5th Cir. 1971), establishes that respondents' action here cannot be justified on their undifferentiated fear of disorder. In that case, college administrators refused officially to recognize a student ACLU chapter because they feared that the ACLU's "litigious orientation" would result in "frivolous, vexatious, and harassing actions to impede the legitimate function of a university." The Court of Appeals ordered the University to recognize the student chapter. It held (Slip. Op. 6-7):

> We think it far more compatible with free expression to relegate the University to its rights if the litigative activities of the Chapter should turn out to be carried on with disruptive intentions and do result in substantial disruption to the life of the University. In that case, the recognition granted the chapter could be challenged and withdrawn in a fair proceeding based upon evidence of actual, and not vaguely predictive misconduct.

B. *Respondents Must Use Less Drastic Means to Secure Its Valid Interest in Being Free of Illegal Disorders.*

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light

of less drastic means for achieving the same basic purpose. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

See also *United States* v. *Robel,* 389 U.S. 258, 265-266 (1967); *Aptheker* v. *United States,* 378 U.S. 500, 508-509 (1964).

The most constitutionally tenable alternative which the college may invoke in order to achieve its lawful objective, is the punishment of individual students, pursuant to valid college rules, for their part in illegal activity. See, for example, *Barker* v. *Hardway,* 399 F.2d 638 (4th Cir. 1968), *cert. denied,* 394 U.S. 905 (1969); and *Estaban* v. *Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969). That measure is not only far less drastic, in First Amendment terms, than banning speech and assembly because of an undifferentiated fear that they will break out into disorder, but also satisfies the general notion, implemented by the due process clause, that punishment must follow, not precede, an offense.

Withdrawal of an organization's recognition, and injunctions against illegal conduct which is clearly and presently threatened, are two other possible means of securing order which are less drastic than the one employed in this case. The former raises some conceptual difficulties because of the special problems which always attend efforts to impose sanctions on an organization *qua* organization in the First Amendment area, for unless all members of an organization participate in illegal activity, withdrawal of recognition necessarily affects First Amendment activity of innocent persons. See, e.g., *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1 (1961). The latter alternative always raises factual, and sometimes procedural,

difficulties (see, e.g., *Carroll* v. *President and Commissioners, supra*), but that is not to say that there cannot be some set of circumstances where an injunction would be constitutionally permissible under even the most stringent First Amendment test. Thus, the Court can consider these two additional alternatives as being less drastic than the prior restraint imposed in this case.

Since these less drastic means were available to respondents, the denial of recognition to CCSC-SDS, which resulted in the direct suppression of speech and assembly, must be declared unconstitutional. As Mr. Chief Justice Hughes said in *DeJonge* v. *Oregon, supra* at 364-365, though rights may be abused, "... intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

CONCLUSION

For the reasons set out above, the decision below should be reversed and the respondents should be ordered to recognize the Central Connecticut State College chapter of Students for a Democratic Society.

Respectfully submitted,

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